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IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

70-88

No. 1308

S & E CONTRACTORS, INC., *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Claims

REPLY BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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Dated: May 10, 1971

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PRELIMINARY STATEMENT

This reply brief is filed by the American Bar Association as *amicus curiae*, pursuant to the written consent of the Petitioner and Respondent which are on file with the Court and pursuant to Rule 24 of the Court.

REASONS FOR GRANTING THE WRIT

In opposing review by this Court, Respondent makes three points.

First, Respondent argues that the Wunderlich Act and its history show no purpose to confine judicial review of contract disputes decisions at the agency head.

level to those adverse to contractors. In particular support of this assertion, Respondent (at p. 6 of its brief) appears to rely on the stated position of one of the sponsors of the Wunderlich legislation, the Associated General Contractors of America, whose witness testified as follows:

“[A]ny decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.”

However, Respondent omits to mention, as Judge Collins in his dissent below did not, that taken in full context the statement of this witness supports legislation providing for judicial review at the instance of contractors only. As stated by Judge Collins (Pet. App. A-36-37):

“The court fails, however, to quote later testimony of this witness which adds a vital gloss to the quoted testimony:

‘In concluding, we respectfully urge that this committee draft legislation that will grant the United States Court of Claims, and the United States district courts to the extent that they now exercise jurisdiction concurrent with the United States Court of Claims, jurisdiction to hear, determine, and enter judgment against the United States on any claim in which the contractor shall seek a review of a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States under any contract entered into with the United States.’ [Emphasis supplied]

"Clearly, looking at his testimony in its entirety, Mr. Hayes was of the opinion that the Government's rights in contract disputes were adequately protected by the 'disputes' clause, which reposes decision-making authority in the Government agencies, and that judicial review was needed only to protect the right of contractors."

Respondent's further challenge to Petitioner's argument that the Government obtained no right of judicial review from the Wunderlich Act because Congress did not adopt a proposal providing for General Accounting Office review of contract disputes decisions is wide of the mark. Here Respondent also fails to take account of the language of the disputes clause according (subject to the Wunderlich Act) contractual finality on the parties to decisions on disputed facts; and this means that no agency of the federal government not empowered by contract or statute to participate in or review the results of the contract disputes process may interfere or otherwise set its results at naught.

Secondly, Respondent argues that Petitioner in urging that the Government is bound by factual decisions favorable to contractors under the contract disputes clause has overlooked the settled rule that the United States may recover public funds wrongfully, erroneously or illegally paid out. Brief for Respondent at 8.

There is no suggestion in the Petition or in our Amicus Curiae Brief in Support of the Petition that actions under the disputes clause necessarily override the power of the Government to recover public funds *illegally* paid. Nor is there any intimation that in proper circumstances responsibility for initiating such recovery may properly fall to the General Accounting

Office as well as to the contracting agency, and, at least in criminal matters, to the Attorney General. What we do question, however, is the blanket assertion of this power by the Attorney General on his own and without regard to the functions committed by statute and by contract to the contracting officer and to the agency head in the resolution and settlement of contract disputes.

Finally, Respondent challenges Petitioner's assertion that the decision below will undermine the effect of the disputes clause in Government contracts "by fomenting litigation, causing long delays and overburdening the courts". Nothing in our experience teaches that Government power, once conferred, is seldom or sparingly exercised.

Respectfully submitted,

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